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**JOINT PETITION OF
SOUTHWESTERN PUBLIC SERVICE
COMPANY AND SOUTHWEST
POWER POOL, INC. FOR
DECLARATORY ORDER**

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OF TEXAS**
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**JOINT PETITION OF SOUTHWESTERN PUBLIC SERVICE COMPANY AND
SOUTHWEST POWER POOL, INC. FOR DECLARATORY ORDER**

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DOCKET NO. _____

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SOUTHWESTERN PUBLIC SERVICE	§	PUBLIC UTILITY COMMISSION
COMPANY AND SOUTHWEST	§	
POWER POOL, INC. FOR	§	OF TEXAS
DECLARATORY ORDER	§	

**JOINT PETITION OF SOUTHWESTERN PUBLIC SERVICE COMPANY AND
SOUTHWEST POWER POOL, INC. FOR DECLARATORY ORDER**

Southwestern Public Service Company ("SPS") and Southwest Power Pool, Inc. ("SPP") file this Joint Petition for Declaratory Order, and respectfully show the following:

I. STATEMENT OF THE CASE

This case presents a controversy regarding whether SPS has the exclusive right to construct and operate new regionally funded transmission facilities in areas of Texas that lie within SPS's service area. SPS contends that the Public Utility Regulatory Act¹ ("PURA") grants an incumbent electric utility operating in areas outside of the Electric Reliability Council of Texas ("ERCOT") a right of first refusal to construct new transmission facilities located in the service area prescribed for that utility by the Public Utility Commission of Texas ("Commission" or "PUC"). In contrast, SPP avers that there is no clear statement in Texas law that incumbent utilities have such a right of first refusal, and therefore SPP is proceeding as if there is no right of first refusal under Texas law and abiding by the portion of its Open Access Transmission Tariff ("OATT") that requires the competitive solicitation and designation of transmission owners, including non-incumbents, to construct and operate new transmission facilities in areas of Texas within the SPP footprint. Because a regionally funded transmission project located in SPS's service territory is scheduled to be considered by the SPP Board of Directors within the next two months, SPS has filed a lawsuit in state district court seeking a declaration that it has the right to build the project.² In light of this Commission's familiarity with PURA and its statutory duty to oversee the electric industry in Texas, SPS and SPP have agreed to abate the lawsuit and to seek

¹ PURA is codified at Tex. Util. Code Ann. §§ 11.001–58.303 (West 2016), §§ 59.001–66.016 (West 2007 & Supp. 2016).

² As explained later in this pleading, SPP has removed the lawsuit to federal district court.

a declaration from the Commission regarding whether Texas law grants SPS a right of first refusal to build the regionally funded transmission project or whether SPP must follow the competitive bid process in the absence of such right of first refusal under Texas law. By this joint petition for declaratory order, SPS and SPP request that the Commission resolve this issue as a matter of law.

II. IDENTITY OF PARTIES

SPS is an electric utility, a public utility, and a utility as those terms are defined in PURA §§ 11.004(1) and 31.002(6) and it is subject to the Commission's jurisdiction under PURA. SPS is a New Mexico corporation headquartered in Amarillo, Texas, with its principal place of business located at 600 S. Tyler Street, Suite 2900, Amarillo, Texas 79101.³

SPP is a Regional Transmission Organization ("RTO") approved and regulated by the Federal Energy Regulatory Commission ("FERC"). SPP's principal place of business is located at 201 Worthen Drive, Little Rock, Arkansas 72223.

III. AUTHORIZED REPRESENTATIVES AND SERVICE OF DOCUMENTS

SPS's authorized representatives in this proceeding are:

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³ SPS is a wholly-owned electric utility subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered holding company that owns several electric and natural gas utility operating companies, a regulated natural gas pipeline company, and three electric transmission companies.

SPS requests that all documents (motions, orders, discovery requests, etc.) be served on its authorized representatives.

SPP requests that all correspondence in regard to this matter be sent to SPP's authorized representatives in this proceeding. SPP's authorized internal counsel of record is:

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SPP requests that all documents (motions, orders, discovery requests, etc.) be served on its authorized representatives.

IV. JURISDICTION

The Commission has jurisdiction over this application under PURA § 14.001, which gives the Commission broad authority "to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction." The Commission also has jurisdiction under PURA § 37.051, which prescribes the conditions under which an entity may provide transmission service in Texas.

V. BACKGROUND

A. SPS Background

SPS, which operates in areas entirely outside of ERCOT, serves approximately 378,000 retail electric customers in a 50,000 square mile area within the Panhandle and the South Plains areas of Texas and the eastern and southeastern portions of New Mexico. SPS is regulated by the Commission, the 80 municipalities it serves in Texas, the New Mexico Public Regulation Commission, and FERC. SPS has no non-regulated activities.

B. SPP Background

Founded in 1941, SPP is a not-for-profit organization in which membership is voluntary. As an RTO, SPP is charged by FERC and the North American Electric Reliability Corporation with the responsibility of ensuring adequate transmission infrastructure, adequate transmission services, and reliable supplies of power in its region, including the operation of regional day-ahead and real-time wholesale markets for electric energy and ancillary services. SPP does not own or build any transmission facilities. Rather, SPP operates the electric power grid in its region to ensure transmission customers are reliably served.

SPS became a member of SPP in 1973, and SPP has provided reliability coordination services for SPS since that time. As a Transmission Owner⁴ under the SPP Membership Agreement, SPS remains responsible for the day-to-day operation and maintenance of its transmission system. In accordance with the SPP Membership Agreement, however, SPS has transferred functional control of its transmission facilities to SPP. SPP directs the operation of SPS's transmission facilities in accordance with the terms of the SPP Membership Agreement and OATT.

Under the SPP OATT, SPP offers transmission service over the transmission facilities of all SPP Transmission Owners, including SPS. The OATT sets forth the rates, terms, and conditions for wholesale transmission service rates for the SPS zone and the other zones in the SPP region. All transmission service arrangements for SPS's wholesale customers are subject to the OATT. SPP bills transmission customers taking service under its OATT for transmission and other services, and it distributes certain revenues to SPS and other Transmission Owners.

⁴ Each transmission-owning member of SPP that has executed a Membership Agreement as a "Transmission Owner" has the obligation to construct, own, operate, and maintain transmission facilities as directed by SPP.

SPP is required to comply with its FERC-approved OATT in order to provide services to transmission customers and to direct the operations of Transmission Owners. This obligation extends to the planning for new transmission construction.

C. The Federal Power Act and FERC Order No. 1000

1. FERC's Jurisdiction

Under the Federal Power Act, FERC has exclusive jurisdiction of the wholesale sale or transmission of electricity in interstate commerce.⁵ FERC's exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates.⁶ FERC's jurisdiction encompasses the determination of just and reasonable rates—including all classifications, practices, regulations, and contracts affecting rates—as well as the authority to entertain complaints that an existing rate or associated charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, or unduly discriminatory or preferential. *See* 16 U.S.C. §§ 824d, 824e.

2. FERC Order No. 1000

FERC Order No. 1000 is an outgrowth of two previous FERC orders designed to promote open access to the transmission grid and to streamline transmission planning. FERC's first effort in that regard was FERC Order No. 888, which was issued in 1996. It required, among other things, that public utilities file an OATT and provide transmission-only services on a non-discriminatory basis.⁷

In 2007, FERC adopted Order No. 890, which, among other things, reformed the *pro forma* OATT to require each public utility transmission provider to have a coordinated, open, and transparent regional transmission planning process.⁸ FERC's stated goal in Order No. 890 was to prevent undue discrimination in transmission planning. FERC allowed utilities who are members of an RTO, like SPS is a member of SPP, to comply with the new requirements by

⁵ *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 41 (2003); *see also* 16 U.S.C. § 824(b).

⁶ *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988).

⁷ *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 75 FERC ¶ 61,080 (1996) (subsequent history omitted).

⁸ *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, at P 3 (2007).

including their systems in the RTO regional planning processes. As a result, SPP is obligated to plan for transmission for the SPS system as part of SPP's regional planning process.

In 2011, FERC adopted Order No. 1000 to address challenges that developed in the electric transmission industry after the issuance of Order No. 890. The most significant of those challenges was the possibility that substantial investment in future transmission facilities would be required to maintain reliable service at reasonable cost.⁹ FERC concluded that reforms were necessary to ensure that these challenges were addressed efficiently and cost-effectively.

The package of reforms adopted in Order No. 1000 addressed transmission planning and cost allocation. Taken together, these reforms were designed to achieve two primary objectives: (1) ensure that transmission planning processes at the regional level consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce a transmission plan that can meet transmission needs more efficiently and cost-effectively; and (2) ensure that the costs of transmission solutions chosen to meet regional transmission needs are allocated fairly to those who receive benefits from them. In particular, Order No. 1000 requires, among other things, that public utility transmission providers, such as SPP, remove from their OATTs or other FERC-jurisdictional tariffs and agreements, any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation.

Order No. 1000 further provides, however, that it is not intended to abrogate state-created rights of first refusal that allow incumbent utilities in those states to build transmission facilities in their service areas. In particular, Order No. 1000 provides that it is not, "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."¹⁰ In addition, Order No. 1000 "does not require removal of references to such state or local laws or regulations" from FERC-approved tariffs or agreements.¹¹ Thus, if

⁹ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at PP 2, 25-31 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012). These orders are collectively referred to throughout as "Order No. 1000," unless a specific sub-order is identified.

¹⁰ *Id.* at P 253, n.231.

¹¹ *Id.* See *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336-37 (7th Cir. 2016).

Texas laws provide an incumbent transmission owner the right to construct transmission facilities in its PUCT-certificated service area, then Order No. 1000 does not remove that right.

D. SPP's Implementation of Order No. 1000's Directive to Remove Federal Rights of First Refusal

To comply with Order No. 1000's directive to eliminate certain federal rights of first refusal under the SPP OATT, SPP developed the Transmission Owner Selection Process to competitively solicit proposals for transmission projects that are no longer subject to a federal right of first refusal. Projects approved for construction or endorsed by SPP's Board of Directors that meet the criteria contained in Attachment Y of the SPP OATT are known as Competitive Upgrades.

To select the Transmission Owner to construct a Competitive Upgrade, SPP issues a request for proposals ("RFP") for the Competitive Upgrade to all Qualified RFP Participants. RFP respondents then have 180 days to submit a complete proposal in response to the RFP.¹² SPP submits the RFP responses to an Industry Expert Panel¹³ for evaluation based on criteria set forth in Attachment Y of the SPP OATT. The Industry Expert Panel must develop a recommendation to present to the SPP Board of Directors consisting of its recommended RFP bidder and an alternative RFP bidder for each Competitive Upgrade. After the Board of Directors selects a bidder and alternative bidder, SPP: (1) notifies the winning bidder that it has been selected to become the Designated Transmission Owner ("Designated Owner") for the Competitive Upgrade; and (2) issues a Notification to Construct ("NTC") for the Competitive Upgrade.¹⁴

E. The Impending Project That Will Test the Interaction Between Order No. 1000 and Texas Law

In late 2016, in conformance with its OATT and its obligations as the designated transmission planner for the SPP area, SPP completed its 2017 Integrated Transmission Planning 10-year Assessment ("2017 ITP10") of transmission needs within the SPP-operated transmission

¹² SPP may reduce the RFP response window to no less than 90 days based on, but not limited to, the Competitive Upgrade's need or scope.

¹³ The "Industry Expert Panel" is a 3-5 person group of industry experts selected from the Industry Expert Pool by the SPP Oversight Committee. The panel is engaged to review and evaluate proposals submitted in response to the Transmission Owner Selection RFP.

¹⁴ A "Notification to Construct" is a formal SPP document specifying approval of and notification to build specific transmission projects with specified need dates for commercial operation.

system. The 2017 ITP10 Report identified 14 transmission projects to be constructed to meet the reliability needs, policy initiatives, and economic opportunities for the SPP transmission system over the next 10 years. One of the projects recommended in the 2017 ITP10 Report was the construction of a new 345 kilovolt (“kV”) transmission line covering a distance of approximately 90 miles from a substation in Potter County, Texas to SPS’s Tolk Generating Plant (“Potter - Tolk line”). The project was identified as an economic project. The list of recommended projects was presented to the SPP Board of Directors at their January 31, 2017 Board Meeting. The Board approved the 13 other projects recommended in the 2017 ITP10, but delayed final action on the Potter - Tolk line until April 2017 due to the need for additional analysis by SPP. The SPP Board of Directors is expected to act on the Potter - Tolk line in April 2017.

F. The State Court Lawsuit Filed by SPS

In January 2017, SPS filed a lawsuit in state district court in Potter County, Texas seeking a declaration that SPS has a right of first refusal to build the Potter - Tolk line, as well as other 345 kV projects to be constructed in SPS’s Texas service territory. SPS also sought an injunction prohibiting SPP from issuing an NTC to any transmission company other than SPS for the Potter - Tolk line.

On February 27, 2017, SPP removed the action to the United States District Court for the Northern District of Texas. SPP and SPS have agreed, however, to request abatement of the federal court action if the Commission assumes jurisdiction over this request for a declaratory order.¹⁵

VI. REQUEST FOR DECLARATION OF RIGHTS

As the following summaries illustrate, a controversy exists between SPP and SPS concerning the proper interpretation of PURA as it affects the application of SPP’s OATT. A declaration of the parties’ rights under Texas law by the Commission would resolve that controversy.

A. Summary of SPS’s Position on Right of First Refusal

PURA § 37.051(a) provides that an “electric utility or other person may not directly or indirectly provide service to the public” unless the person first obtains from the PUCT a Certificate of Convenience and Necessity (“CCN”) “that states that the public convenience and

¹⁵ SPS may file a motion to remand the action back to state court.

necessity requires or will require the installation, operation, or extension of the service.” SPS contends that this provision of PURA does not authorize the issuance of a CCN to an electric utility or other person that provides transmission-only service in areas of Texas outside of ERCOT. It is SPS’s position that PURA § 37.051(d) provides the only authority to issue a CCN for a transmission-only utility, and this authority is unambiguously limited to areas within ERCOT.¹⁶ SPS further contends that the legislative history of PURA § 37.051(d) confirms that transmission-only utilities are not permitted outside of ERCOT. Finally, SPS relies on PURA § 37.151, which provides that any CCN holder other than a transmission-only utility in ERCOT must: (1) serve every consumer in the utility’s certificated area; and (2) must provide continuous and adequate service in that area.

B. Summary of SPP’s Position on Right of First Refusal

SPP’s OATT provides that it will use a competitive process for selecting the entity to build and own transmission facilities if certain requirements are met, including, “[t]ransmission facilities [are] located where the selection of a Transmission Owner pursuant to Section III of this Attachment Y does not violate relevant law where the transmission facility is to be built.”¹⁷ Attachment Y, Section III of the OATT establishes the procedure for designating a Transmission Owner pursuant to a competitive bid process. Because SPP determined that there was no local law (i.e., Texas state statute) that clearly would be violated by the use of the competitive bid process in Texas, SPP’s OATT requires the use of such process.¹⁸ Accordingly, without an interpretation by this Commission (or the applicable court, if this Commission declines to assert jurisdiction), SPP will treat the Potter - Tolk line as a Competitive Upgrade and will issue an RFP for competitive bids to construct the project, in compliance with the provisions in SPP’s OATT.

¹⁶ That provision states, “a [CCN] may be granted to an electric utility or other person under this section for a facility used as part of the transmission system serving the ERCOT power region solely for the transmission of electricity.”

¹⁷ SPP OATT, Attachment Y, Section I (1)(e).

¹⁸ SPP’s assessment of Texas law is based upon the Austin Court of Appeals decision and underlying PUCT Order in *Pub. Util. Comm’n of Texas v. Cities of Harlingen*, 311 S.W.3d 610 (Tex. App.—Austin, Mar. 26, 2010, no pet.) and filings in *Application of Entergy Texas, Inc., ITC Holdings Corp., Midsouth Transco LLC, Transmission Company Texas, LLC, and ITC Midsouth LLC for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals; and Related Relief*, Docket No. 41223 (Aug. 15, 2013).

C. The Need for a Declaratory Order

As the foregoing summary demonstrates, SPS and SPP have a justiciable controversy that is ripe for decision. If the Commission does not declare the parties' rights under PURA, SPS will be forced to pursue its remedies in the federal court action. Should that court decline to enjoin the SPP from issuing an RFP for the Potter - Tolk line, SPS will be forced to prepare and submit a response to the SPP RFP for the Potter - Tolk line to protect its statutory right to serve all customers within its Commission-certificated service area. SPS estimates that preparation of an RFP response would cost at least \$750,000, an expense that SPS should not be forced to incur if it has a right of first refusal under Texas law.¹⁹ Moreover, if SPS has a right of first refusal under PURA, a declaratory order will avoid the need for SPP to issue an RFP and to undertake the effort of evaluating the responses to the RFP. Finally, if SPP issues the RFP, all other entities that have an interest in constructing and owning the Potter - Tolk line will be forced to prepare bids that may ultimately prove to be unnecessary, thereby incurring significant expenses.

VII. PROPOSED SCHEDULE

In order to expeditiously decide the issues raised by this petition, SPP and SPS request that the Commission establish a procedural schedule for the submission of briefs by the parties to decide the proper application of PURA. SPP and SPS believe that the issues raised by this petition are questions of law and can be decided based upon an agreed statement of facts to be developed by the parties and submitted to the Commission. The parties would then submit initial briefs and reply briefs for consideration by the Commission pursuant to a procedural schedule issued by a Commission Administrative Law Judge ("ALJ"). The parties request that the Commission consider the briefs and reply briefs and issue a decision itself rather than requiring the ALJ to issue a proposal for decision. SPP and SPS suggest the adoption of the procedural schedule set forth below:

Petition filed	Day 1
Deadline for Intervention	Day 30
Parties submit an agreed statement of facts/record	Day 52
Initial Brief	Day 73
Reply Brief	Day 87

¹⁹ Each Qualified RFP Participant that submits a proposal will incur similar expenses.

VIII. NOTICE

There are no provisions of PURA or the Commission's Procedural Rules that establish specific notice requirements or intervention deadlines for this type of proceeding. Accordingly, under 16 Tex. Admin. Code 22.55, the presiding officer may require reasonable notice to affected persons. SPP and SPS propose that appropriate notice be provided by Commission-issued notice in the Texas Register. Additionally, SPP will provide notice to its members on its web site concerning the filing of this petition. SPP and SPS believe that this will provide sufficient public notice to persons that may be affected by the joint request for a declaratory order. A proposed form of the notice is attached to this petition as Exhibit A. Because of the need to obtain an expeditious decision, SPP and SPS propose that the deadline for intervention be set at 30 days following the date of filing of this petition and the date be stated in the notice.

IX. CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated in this petition, SPS and SPP pray that the Commission:

- (a) enter an order declaring whether Texas law grants an incumbent electric utility a right of first refusal to construct and operate Competitive Upgrade transmission facilities in areas of Texas outside of ERCOT;
- (b) establish the procedural schedule set out in Section VII of this petition;
- (c) approve the method and form of notice described in Section VIII of this petition;
and
- (d) grant them such other relief to which they are entitled.

Respectfully submitted,

WINSTEAD PC

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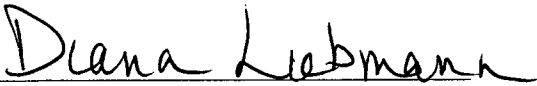

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by permission


EXHIBIT "A"

NOTICE OF JOINT PETITION FOR DECLARATORY ORDER

On February 28, 2017, Southwest Power Pool, Inc. (SPP) and Southwestern Public Service Company (SPS) filed a joint petition for declaratory order requesting that the Public Utility Commission of Texas (Commission) interpret the Public Utility Regulatory Act, Texas Utilities Code Title 2, as it applies to the process for selecting entities to construct and own transmission facilities located in Texas under SPP's Open Access Transmission Tariff. The joint petition seeks a declaration as to whether SPP may designate entities other than the incumbent Texas utility to construct and own regionally-funded transmission facilities located in Texas but providing service outside the Electric Reliability Council of Texas. A complete copy of the joint petition may be reviewed online on the Commission's website.

Persons who wish to intervene in or comment upon the proceeding should notify the Commission in writing as soon as possible as an intervention deadline will be imposed. SPP and SPS have requested an intervention deadline of 30 days after the filing of the petition. If that request is granted, the intervention deadline will be March 28, 2017.

Persons who wish to intervene or comment on the joint petition should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission through Relay Texas by dialing 7-1-1. All correspondence should refer to PUCT Docket No. _____.